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In the

Supreme Court of the United States

October Term, 1957

No. 638

THE AFRO AMERICAN COMPANY OF BALTIMORE, INCORPORATED, A MARYLAND CORPORATION,

Petitioner

v.

ALINE OWEN,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE PETITION BECAUSE NO FEDERAL QUESTION WAS RAISED OR DECIDED IN EITHER OF THE COURTS BELOW.

This Court has no jurisdiction to entertain the petition, because it does not appear from the record in the trial court or the record in the Supreme Court of Appeals of Virginia that a federal question was presented or decided in either court.

TRIAL PROCEEDINGS

The petitioner filed the following defensive papers in the trial court: a demurrer to respondent's motion for judgment; a statement of grounds of defense; a motion for summary judgment and the grounds thereof; exceptions of the petitioner to the action of the court in overruling its motion for summary judgment; a motion to set aside the verdict of the jury and the grounds thereof, and a motion for judgment *non obstante veredicto* and the grounds thereof.*

Petitioner did not even suggest a federal question in any of the foregoing papers.

Upon overruling the motion to set aside the verdict the court entered an order rendering judgment on the verdict and filed an opinion giving its reasons for overruling the motion. No federal question was mentioned either in the order or the opinion of the court.

The federal question presented to this Court in the petition for certiorari was not presented or decided in any manner in the trial court. This is plainly evident by the opinion of the court. The trial court's opinion expressed in a letter to counsel, is as follows:

> "Gentlemen: In re: *Owen v. Afro-American*
>
> "I have Mr. Allen's letter of November 2 and Mr. Lavin's letter also of November 2 in regard to the above case.
>
> "I held that the Mitchell divorce suit was such a judicial proceeding that the matters contained in the suit were privileged. But the law recognizes that even in privileged matters the privilege can be abused. (1) Where the papers were ordered sealed by the court; (2) Where the publication is not an accurate account

*References cannot be made to the record because counsel for respondent has not been served with a copy of the record.

of the proceedings; (3) Where the matters in the proceedings are unfit to print.

"The papers in the divorce suit were not sealed and I held upon the trial of the case that the account of the proceedings as published in the Afro-American was substantially correct and submitted the case to the jury on the third exception, which was whether or not the matters published in the Afro-American were unfit to print and by their verdict the jury decided that the matters so printed were unfit.

"This exception to the privilege of being matter unfit to print, seems to be generally recognized in the law books and is so stated in both Corpus Juris Secundum and American Jurisprudence under the heading of 'Libel and Slander' and in various cases decided in the United States, none of which were in Virginia. While this seems to be recognized law, the attorneys in this case on either side, have been unable to find a case in the United States in which this particular abuse of privilege has come to a higher court. This fact weakens to a certain extent the force of this law.

"However, as it seems to be the law, I am of the opinion that the motion to set aside the verdict in this case should be over-ruled and judgment entered on the verdict.

"Mr. Allen may draw the order in accordance with the above expressed views and submit it to the attorneys for the defendant, and then present it to me for entry.

"Very truly yours,

(s) J. G. Jefferson, Jr.
J. G. Jefferson, Jr."

APPELLATE PROCEEDINGS

Following the rendition of the judgment, petitioner filed a notice of appeal and a statement of its assignments of error as required by Virginia practice. No federal question

was mentioned in any of the assignments of error.

Under Virginia law, an appeal to the Supreme Court of Appeals is not a matter of right. A petition for an appeal has to be filed setting forth "the errors assigned and the questions involved in the appeal" (Rule 5:3(1); Rule 5:12).* The errors assigned in the petition for appeal in this case and the statement of the questions involved do not contain any federal question.

The Supreme Court of Appeals rendered no opinion. It merely entered the following order declining to review the case:

> (September 6, 1957)
>
> "The petition of the Afro American Company of Baltimore for a writ of error to a judgment rendered by the Circuit Court of Dinwiddie County on the 12th day of January, 1957, in a certain proceeding then therein depending wherein Aline Owen was plaintiff and Afro American Company of Baltimore, etc., et al were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

ARGUMENT — FEDERAL QUESTION

As stated by this Honorable Court in *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206, 58 S. Ct. Rep. 528:

> "The supreme court has no jurisdiction to review a state court decision unless it appears affirmatively from

* See Appendix.

> the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment as rendered could not have been given without deciding it. Jud. Code § 237, as amended, 28 U.S.C.A. § 344."

See also the late case of *Durley* v. *Mayo*, 351 U. S. 277, 76 S. Ct. 806, decided June 4, 1956, rehearing denied October 8, 1956, 77 S. Ct. Rep. 22.

The record in the Supreme Court of Appeals of Virginia shows that respondent, Mrs. Owen, filed a cross-assignment of error to the effect that the proceedings in the divorce suit, consisting of nothing but the bill of complaint and the answer without any judicial action thereon, did not constitute a judicial proceeding within the purview of the law of libel that a fair report of a judicial proceeding is privileged. In support of this cross-assignment of error it was shown that the authorities are practically unanimous in support of the contention. The Supreme Court of Appeals of Virginia might well have declined to review the case on this ground. *Times-Dispatch* v. *Zoll*, 148 Va. 850, 139 S. E. 505; *Darnell* v. *Davis*, 190 Va. 707, 58 S. E. 2d 68; *Coxley* v. *Pulsifer*, 137 Mass. 392, 50 Am. Rep. 319; *Lundin* v. *Post-Publishing Co.*, 217 Mass. 213, 52 L. R. A. (N.S.) 207; *Nixon* v. *Times-Dispatch Printing Co.* (Minn.), 12 L. R. A. (N.S.) 183; *Ilsley* v. *Sentinel Co.*, 126 Am. St. Rep. 928; *Williams* v. *New York Herald*, 150 N. Y. S. 838; *Finnegan* v. *Eagle Printing Co.*, 179 N. W. 788; *Parsons* v. *Age-Herald*, 61 So. 345; *Barber* v. *St. Louis Dispatch Co.*, 3 Mo. App. 377. *Restatement of Law of Torts*—American Law Institute, Part 1, pages 294-295; *Newell on Libel and Slander*, 4th Ed., page 412, Sec. 384; *Odgers on Libel and Slander*, page 220; *Gatley on Libel and Slander*, 3rd Ed.,

pp. 346-347-348; 33 Am. Jur., page 153, Sec. 157; 53 C. J. S., pp. 205, 207, 208; *Prosser on Torts*, 2nd Ed., 1955, Chap. 19, p. 624. See also the following annotations:

1. Publication of pleadings before they come before the court as privileged within law of libel. 11 Ann. Cas., page 162.
2. Publication of pleadings before they come before Court as privileged within the law of libel. 17 Ann. Cas., page 618.
3. The liability for libel or slander in the course of judicial proceedings. 126 Am. State Rep. 932.
4. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 12 L. R. A. (N.S.) 188.
5. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 38 L. R. A. (N.S.) 913.
6. To what proceedings in Court does privilege of publication attach? 16 L. R. A. (N. S.) 953.
7. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 52 L. R. A. (N.S.) 207.
8. Libel and Slander: Privilege as to reports of judicial proceedings as attaching to publication of pleadings, etc., before hearing. 52 A. L. R. 1438.
9. Libel and Slander: Privilege as to reports of judicial proceedings as attaching to publication of pleadings, etc., before hearing. 104 A. L. R. 1124.
10. What proceedings are within rule of privilege with respect to report of judicial proceedings? Ann. Cas. 1915-A, page 36.
11. Publication of pleadings before they come before court

as privileged within the law. Ann. Cas. 1915-A, page 129.

If the Supreme Court of Appeals of Virginia might have rested its decision upon this well-settled principle rather than upon the constitutional question (injected into the case for the first time in the petition to this Court), and there is nothing to show whether the Court rested its decision on this principle or upon the constitutional question, then this Court will have to refuse certiorari.

In the late case of *Durley* v. *Mayo*, 351 U. S. 277, 76 S. Ct. Rep. 806, this Court said:

> "'Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground; this Court will not take jurisdiction to review the judgment.' Stembridge v. State of Georgia, 343 U. S. 541, 547, 72 S. Ct. 834, 837, 96 L. Ed. 1130.
>
> "'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 470; Lynch v. People of New York (ex rel. Pierson), 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."

THE CASE ON ITS MERITS

If the Court should grant certiorari in this case, it would have to affirm the judgments below on the merits of the case.

upon the authority of *Roth* v. *United States*, 77 S. Ct. Rep. 1304, decided June 24, 1957. In that case the Court said:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

And the test of obscenity approved by the Court was:

> "Whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interests."

And the lower court's charge to the jury, as follows, was approved:

> "You and you alone are the exclusive judges of what the common conscience of the community is."

True, the *Roth* case was a criminal case, but in Virginia we have an obscenity statute similar to the one passed on in the *Roth* case, Virginia Code Section 18-113;* and we also have a statute providing for the recovery of damages for the violation of a criminal statute where any person suffers damages as a result of such violation, Virginia Code Section 8.652.*

It was expressly decided in the case of *Andreze Duncan* v. *Henry Thwaites*, 3 B. & C. 556 (1924), in the Court of King's Bench, that a plaintiff may recover of a defendant, for publishing a libel charging the plaintiff with indecent conduct to a female child notwithstanding a criminal prosecution would also lie against the defendant. This case also involved the privilege of publishing an accurate report of

*See Appendix.

judicial proceedings and it was held that no such privilege attached to the publication of obscenity appearing in a judicial proceeding.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Rule 5:3, §1, of Rules of Supreme Court of Appeals of Virginia:

Rule 5:3. Petitions for Appeal and Briefs in Opposition

§1. Form and Contents of Petition. Except as provided in this Rule, and except when the appeal is a matter of right, the form and contents of the petition for appeal shall conform in all respects to the requirements for the appellant's opening brief, but need not be printed. The petition for appeal may be adopted as and in lieu of the opening brief if the election to do so is clearly stated therein. If so adopted it shall be printed and distributed as the record is printed and distributed under Rule 5:12, §4, except that it shall be printed under separate cover. The cost of printing shall be recoverable to the extent and under the conditions provided by Code, Section 14-179.

Rule 5:12. Briefs.

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

Virginia Code Section 18-113 as amended by the Acts of 1952.

§18-113. Publishing, etc., obscene books, motion pictures, etc.—If any person, firm, corporation, or association import, print, exhibit, publish, sell, lease, use or distribute any book, pamphlet, ballad, printed page, phonographic record, or other thing containing obscene language or which is otherwise indecent, or any print, picture, motion picture, film, figure, or description manifestly tending to corrupt the morals of youth, or introduce into any family or place of education, or buy or have in his possession any such article for the purpose of sale, exhibition or circulation, or with intent to introduce it into any family or place of education, he shall be guilty of a misdemeanor. (Code 1919, §4549; 1920, p. 340; 1952, c. 270.)

Virginia Code Section 8-652.

§8-652. Damages from violation of a statute, remedy therefor and the penalty.—Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. And the damages so sustained together with any penalty or forfeiture imposed for the violation of the statute may be recovered in a

single action of trespass on the case upon proper counts when the same person is entitled to both damages and penalty; but nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively. (Code 1919, § 5785.)